

David K. Byers
Administrative Director
Administrative Office of the Courts
1501 W. Washington, Suite 411
Phoenix, AZ 85007
(602) 452-3301
Projects2@courts.az.gov

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of	Supreme Court No. R-21-0022
PETITION TO AMEND RULES)	
6.1, 7.2, and 7.4,)	Reply to Comments
ARIZONA RULES OF CRIMINAL)	
PROCEDURE)	
_____)	

Pursuant to Rule 28 of the Arizona Supreme Court, David K. Byers, Administrative Director, Administrative Office of the Courts, respectfully submits this reply to comments posted in this matter. Please note that comments posted on and before May 27 and one comment submitted after that date addressed the original petition rather than the supplemental petition. The supplemental petition significantly reduced the proposed changes to just two intended nontechnical changes. This reply will focus on comments concerning those two changes. It will also address an intended technical change that was identified by a commenter as an inconsistency between the rules and a statute.

I. Legal Paraprofessional Proposal

The proposed addition of Rule 6.1(f) would provide the option for all

detainees to be represented by a legal paraprofessional (LP) authorized by Supreme Court Rule 31.3(e)(4) and ACJA § 7-210 as provided in a proposed amendment to § 7-210 (F)(2)(c) recently published on the ACJA Forum:

~~Limited Jurisdiction~~ Criminal Law. Legal paraprofessionals may render authorized services:

- (1) At any initial appearance, or, when the defendant is not represented by counsel in subsequent criminal proceedings, for the limited purpose of advocating for release of a defendant from pretrial detention.
- (2) ~~in~~ For criminal misdemeanor matters before a municipal or justice court of this state where, upon conviction, a penalty of incarceration is not at issue, whether by law or by agreement of the prosecuting authority and trial court.

Under Rule 4.2 counsel is appointed **at**, not **for**, the initial appearance (IA) where the initial bail determination is made. The proposed new Rule 6.1(f) would afford detainees the right to retain LPs for the services authorized by ACJA § 7-210 and permit them the same access to detainees as attorneys are permitted in Rule 6.1(a). Only APAAC and COVIC commented on the LP proposal.

A. APAAC Comment

Understandably, in identifying a problem with the proposal, APAAC's comment refers to the current language of ACJA § 7-210 that limits LP practice to misdemeanors in limited jurisdiction courts. The proposed criminal practice authorization stated above would extend LP practice to felony IAs in superior court and subsequent bail proceedings when counsel has not been appointed. Also, APAAC appears to misread ACJC § 7-210(F)(1) in concluding that it does not authorize an LP to cross-examine and call witnesses. This provision authorizes an

LP to “Appear before a court or tribunal on behalf of a party...” If an appearance is for a hearing ordered in response to a motion to review conditions of release, discussed below, it may necessarily involve examination and cross-examination of witnesses.

B. COVIC Comment

COVIC voted to approve the supplemental petition and commented favorably on the LP proposal “legal representation at the initial appearance and at a subsequent bail review hearing should serve to fully litigate the matter of pretrial release at an early stage of the criminal proceedings.” COVIC also discussed the potential value of authorizing LPs to represent victims at IAs and for Rule 7.4(c)(1) proceedings. Members recognize that extension of LP practice will need to be proposed separately.

II. Later Review of Conditions

The proposed amendment to 7.4(c)(1) provides that, on motion of a party or on its own, the court may determine the conditions of release under the bail rules and statutes in the additional circumstance that “the defendant is unable to post bond due to the defendant’s financial condition.” This rule currently provides for reexamination of conditions of release “if a motion alleges the existence of material facts not previously presented to the court.” Petitioner has been informed that most judges do not consider the defendant’s actual inability to pay the bond set at the IA

to be a fact material to determination of release conditions and decline to reexamine release conditions under Rule 7.4(c)(1) for this reason.

A. Mohave County Attorney and Judge Slayton Comments

One objection to this proposed change by the Mohave County Attorney is that “The new language in Rule 7.4(c)(1) suggests that the judge (presumably at the IA) is not skilled or apt enough to follow 7.2(a)(3) which requires the judge to consider the defendant’s “employment [and] financial resources” under A.R.S. 13-3967(B)(7).” Similarly, Judge Slayton states, “The proposed rule also appears to contemplate judges failing to comply with their legal and ethical duties to consider A. R. S. 13-3967 as well as A. R. Cr. P. Rule 7.2 (3)(A-G).” These comments ignore the reality that the information available at the IA may be quite limited and that even with the best information, the defendant’s future ability to make a bond of any particular amount cannot be predicted at the time of the IA with any degree of certainty. The IA judge may have set the bond in an amount intended to secure the defendant’s appearance but not expecting the defendant would be unable to make the bond. The proposed change simply provides an additional **procedural** option for a detainee in this situation to alert the court that the bond set has in fact resulted in detention. Neither the original petition nor the supplement has proposed any changes to the factors to be considered by judges making bail decisions. Instead, a defendant who failed to make bond since the IA may ask the reviewing judge to conclude that

a lower bond or other conditions would enable release and sufficiently secure that particular defendant's appearance considering the factors provided in the statutes and rules.

Another objection by the Mohave County Attorney is that the proposal "allows the defendant to literally move for a redetermination of release conditions the second after the court sets release conditions by simply claiming she/he is unable to post the bond." The judge could simply deny the motion if it does not present a reason for review of the conditions set at the IA. Additionally, the defendant probably would not have been represented by counsel at the IA, though a prosecutor may have been present and may have argued for the bond amount set. However, under Rule 6 the defendant will be represented by counsel, or by an LP as proposed herein, capable of filing a Rule 7.4(c)(1) motion that makes a convincing argument that the bond preventing release is not reasonably necessary considering the factors provided in statutes and rules. Presumably, counsel or an LP would be both more capable and have more information on which to base argument for release at the Rule 7.4(c)(1) proceeding than the defendant at the IA. The defendant and defendant's counsel or LP should be deterred from filing a motion not based on additional information and sound argument by the limitation in the proposed amendment to one motion due to inability to afford a bond.

III. Standard for Imposing Additional Conditions of Release

In addition to the primary rule change proposals, the original and the supplemental petitions proposed a change that was understood to be technical; conforming the “reasonably” standard in Rule 7.2(a)(2) to the “reasonable and necessary” standard required by Rule 7.3(a). APAAC noted that the proposed rule terminology is inconsistent with the use of the term “reasonably necessary” in A.R.S. § 13-3967. Petitioner agrees with APAAC that the term “reasonably” in 7.2(a)(2) should be changed to “reasonably necessary.” However, it is beyond the scope of this comment to propose any additional changes to Rule 7. Any other changes to Rule 7 suggested by APAAC should be proposed and considered in a separate petition.

IV. Conclusion

For some defendants, the sudden loss of liberty that occurs with pretrial detention has a more significant impact than the sentence for the offense for which they are detained, especially misdemeanor defendants detained for offenses for which they will receive little or no time in jail. The initial detention decision is made at the IA, typically without the benefit of argument of appointed defense counsel. Legal paraprofessionals representing defendants at the IA could provide useful additional information and argument concerning release that is not currently available to the magistrate at the IA. The process due to detainees unable to make

bond is an early opportunity with assistance of counsel to fully contest whether the defendant's detention is required to serve the purposes of bail or is simply due to the defendant's indigence. The proposed addition to Rule 7.2(a)(2) of review of conditions of release for detainees who cannot make bond may provide this opportunity.

Wherefore, petitioner respectfully requests that the Court amend Rules 6.1 and 7.4 of the Rules of Criminal Procedure as proposed in the Appendix of the supplement to the petition and that the Court amend Rule 7.2 as proposed except that the term "reasonably" be replaced by the term "reasonably necessary" rather than "reasonable and necessary".

RESPECTFULLY SUBMITTED this 7th day of July, 2021.

By /S/
David K. Byers, Administrative Director
Administrative Office of the Courts
1501 W. Washington Street, Suite 411
Phoenix, AZ 85007
(602) 452-3301
Projects2@courts.az.gov